3.04 BURDEN OF PROOF
(Ordinary Civil Case)

Your verdict depends on whether you find certain facts have been proved [by the greater weight of the evidence]. In order to find that [(a fact) (an element)] has been proved [by the greater weight of the evidence], you must find that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

You have probably heard of the phrase "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

Committee Comments

The phrases which are bracketed are optional, depending upon the preference of the judge. The Committee recognizes that judges may desire to use the burden-of-proof formulation found in the pattern jury instructions adopted by their particular states. If such a burden-of-proof instruction is used, this instruction must be modified accordingly.

5.50 AMERICANS WITH DISABILITIES ACT ("ADA") (Employment Cases Only)
Introduction

The following instructions are designed for use in disability cases under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

These instructions are not intended to cover cases with respect to public accommodations or public services under the ADA. Rather, these instructions are intended to cover only those cases arising under the employment provisions of the ADA. The ADA was amended significantly, effective January 1, 2009, by the ADA Amendments Act of 2008. Because the amendments are not retroactive, it may be necessary to consult the prior version of these instructions, included in the appendix, if a case involves claims arising prior to January 1, 2009.

To establish a prima facie case under the ADA, an aggrieved employee must establish that he or she has a disability as defined in 42 U.S.C. § 12102(2); that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he or she has suffered adverse employment action on the basis of disability. 42 U.S.C. § 12112(a).

A "Disability" Under the ADA

Under the ADA, a "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). This definition "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." 42 U.S.C. § 12102(4)(A).

As amended, effective January 1, 2009, the ADA defines "major life activities" as including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. § 12102(2)(A). A "major life activity" also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. 42 U.S.C. § 12102(2)(B).

"Physical or Mental Impairment"

An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. 42 U.S.C. § 12102(4)(C). An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 42 U.S.C. §12102(4)(D). The ADA specifically directs that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as:

I. medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

II. use of assistive technology;

III. reasonable accommodations or auxiliary aids or services (e.g., interpreters, readers, or acquisition or modification of devices);

IV. learned behavioral or adaptive neurological modifications.

42 U.S.C. § 12102(4)(E)(I).

"Being Regarded as Having Such an Impairment"

An individual meets the requirement of being regarded as having such an impairment "if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). However, 42 U.S.C. § 12102(1)(C), the provision that includes "being regarded as having such an impairment" in the definition of disability, does not apply to impairments that are transitory (having an actual or expected duration of 6 months or less) and minor. 42 U.S.C. § 12102(3)(B).

Knowledge of the Disability

Unlike other discrimination cases, the protected characteristic of the employee in a disability discrimination case may not always be immediately obvious to the employer. As the Seventh Circuit has stated, "It is true that an employer will automatically know of many disabilities. For example, an employer would know that a person in a wheelchair, or with some other obvious physical limitation, had a disability." *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 932 (7th Cir. 1995). Furthermore, it may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability (*e.g.*, an employee who suffers frequent seizures at work likely has some disability). *Id.* at 934. Finally, an employer may actually know of disabilities that are not immediately obvious, such as when an employee asks for an accommodation under the ADA and submits supporting medical documentation. *See id.* at 932.

An employer's mere knowledge of the disability's effects, far removed from the disability itself and with no obvious link to the disability, is generally insufficient to create liability. As one court has aptly stated, "[t]he ADA does not require clairvoyance." *See id.* at 934.

A number of Eighth Circuit decisions suggest that an employer must have actual knowledge of an employee's disability before the employer may be exposed to liability. *See, e.g., Miller v. National Casualty Co.*, 61 F.3d 627, 629-30 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg*, 47 F.3d at 934)); *Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that the employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the

plaintiff concealed the severity of his disabling condition even though the employer had some awareness of the plaintiff's health problems).

A "Qualified" Individual with a Disability

In order to be protected by the ADA, an individual must be a "qualified individual with a disability." To be a qualified individual, one must be able to perform the essential functions of the job with or without reasonable accommodations. 42 U.S.C. § 12111(8); *see also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000) (determination of qualification involves two-fold inquiry--whether the person meets the necessary prerequisites for the job, such as education, experience and training, and whether the individual can perform the essential job functions with or without reasonable accommodation); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 574-76 (8th Cir. 2000) (in order for court to assess whether the plaintiff is "qualified" within the meaning of the ADA, the plaintiff must identify particular job sought or desired).

Essential Functions of the Job

The phrase "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998). "Essential functions" does not include the marginal functions of the position. *Id.* (citing 29 C.F.R. § 1630.2(n)(1)). The EEOC regulations suggest the following may be considered in determining the essential functions of an employment position: (1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions prepared for advertising or used when interviewing applicants for the job; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement if one exists; (6) the work experience of persons who have held the job; and/or (7) the current work experience of persons in similar jobs. 29 C.F.R. § 1630.2(n)(3); *Moritz*, 147 F.3d at 787. *See also Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) ("An employer's identification of a position's "essential functions" is given some deference under the ADA."); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113-14 (8th Cir. 1995) (discussing "essential functions" and relevant EEOC regulations); *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002) (employee's absenteeism prevented her from performing essential functions of job); *Dropinski v. Douglas County*, 298 F.3d 704, 708-09 (8th Cir. 2002) (employee who could not perform several of the functions of the written job description for an automatic equipment operator, including tasks entailing bending, twisting, squatting and lifting over fifty pounds, could not perform essential functions of the job); *Alexander v. The Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003) (vacuuming was an essential function of housekeeping supervisor position; the plaintiff, whose physician said she could do no vacuuming, was not a qualified individual); *Rehrs v. The Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (shift rotation was an essential function of plaintiff's job, where all technician positions were on rotating shifts). A temporary accommodation exempting an employee from certain job requirements does not demonstrate that those job functions are non-essential. *Id.* at 358.

Resolving a conflict among the courts of appeals, the United States Supreme Court held that an ADA plaintiff's application for or receipt of benefits under the Social Security Disability

Insurance program neither automatically estops the plaintiff from pursuing his or her ADA claim nor erects a strong presumption against the plaintiff's success under the ADA. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797 (1999). Nonetheless, to survive a motion for summary judgment, the plaintiff must explain why his or her claim for disability benefits is consistent with the claim that he or she could perform the essential functions of his or her previous job with or without reasonable accommodation. *Id.*; *accord Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891, 893 (8th Cir. 1999). *See also Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084-85 (8th Cir. 2000) (affirming grant of summary judgment to employer in part because the plaintiff failed to overcome presumption, created by prior allegation of total disability, that he or she is not a qualified individual within the meaning of the ADA); *Gilmore v. AT&T*, 319 F.3d 1042 (8th Cir. 2003) (affirming summary judgment for employer where the plaintiff failed to provide any evidence to reconcile her ADA claim with her assertion, in application for Social Security Disability, that she was unable to perform essential functions of her job).

"Reasonable Accommodation"

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). A refusal to provide a reasonable accommodation can amount to a constructive demotion. *See Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 717-18 (8th Cir. 2003).

Although there is no precise test for determining what constitutes a reasonable accommodation, the ADA does not require an accommodation "that would cause other employees to work harder, longer, or be deprived of opportunities." *Rehrs*, 486 F.3d at 357. An accommodation is unreasonable if it imposes undue financial or administrative burdens or if it otherwise imposes an undue hardship on the operation of the employer's business. 42 U.S.C. § 12112(b)(5)(A); *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999). The "undue hardship" defense is discussed below.

The ADA provides that the concept of "reasonable accommodation" may include: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9). *See also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-14 (8th Cir. 1995) (discussing "reasonable accommodations" and relevant EEOC regulations).

Although part-time work and job restructuring may be considered reasonable accommodations, "[t]his does not mean an employer is required to offer those accommodations in every case." *Treanor*, 200 F.3d at 575. Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Id.*; *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd*, 207 F.3d at 1084; *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an

employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B)); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (the plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be "necessary" as a reasonable accommodation. *See Cravens*, 214 F.3d at 1018. The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of "last resort"; that is, the "very prospect of reassignment does not even arise unless accommodation within the individual's current position would pose an undue hardship." *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). An employer who has an established policy of filling vacant positions with the most qualified applicant is not required to assign the vacant position to a disabled employee who, although qualified, is not the most qualified applicant. *Huber v. Wal-Mart Stores*, 486 F.3d 480, 483-84 (8th Cir. 2007). In addition, an employer is not required to "bump" another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be "otherwise qualified" for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

An employer's showing that the requested accommodation would violate the rules of an existing seniority system is ordinarily enough to show that the accommodation is not "reasonable" and to entitle the employer to summary judgment. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394,406 (2002). The employee may defeat summary judgment by presenting evidence of special circumstances that make an exception to a seniority rule "reasonable" in the particular case. *Id.* at 1519, 1525. Examples of special circumstances are the employer's fairly frequent exercise of a right to change the seniority system unilaterally and a seniority system containing exceptions such that one further exception is unlikely to matter. *Id*. at 1525.

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.3d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record which allegedly had resulted from prior psychological problems because "an employer

may hold disabled employees to the same standard of law-abiding conduct as all other employees").

For more discussion of "reasonable accommodations" under the ADA, *see infra* Model Instruction 5.51C and Committee Comments.

The Interactive Process

Before an employer must make an accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists. *Miller v. National Casualty Co.*, 61 F.3d 627, 629 (8th Cir. 1995); *accord Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 726 (8th Cir. 1999). Thus, it is generally the responsibility of the plaintiff to request the provision of a reasonable accommodation. *Miller*, 61 F.3d at 630 (citing 29 C.F.R. § 1630 App., § 1630.9); *Cannice*, 189 F.3d at 727; *accord Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999) (The burden remains with the plaintiff "to show that a reasonable accommodation, allowing him to perform the essential functions of his job, is possible."); *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F. 3d 1212, 1218 (8th Cir. 1999) (affirming grant of summary judgment for the defendant where "only [the plaintiff] could accurately identify the need for accommodations specific to her job and workplace" and she failed to do so); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 689 (8th Cir. 1998) ("Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." (citation omitted)).

Once the plaintiff has made such a request, the ADA and its implementing regulations require that the parties engage in an "interactive process" to determine what precise accommodations are necessary. *See* 29 C.F.R. § 1630.2(o)(3) & § 1630 App., § 1630.9; *accord Fjellestad*, 188 F.3d at 951. This means that the employer "should first analyze the relevant job and the specific limitations imposed by the disability and then, in consultation with the individual, identify potential effective accommodations." *See Cannice*, 189 F.3d at 727. In essence, the employer and the employee must work together in good faith to help each other determine what accommodation is necessary. *Id.*

Several courts, however, have held that an employer's failure to engage in an interactive process, standing alone, is insufficient to expose the employer to liability under the ADA. *See, e.g., Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 752 (9th Cir. 1998) (and cases cited therein); *accord Cravens*, 214 F.3d at 1021; *Fjellestad*, 188 F.3d at 952 ("We tend to agree with those courts that hold that there is no per se liability under the ADA if an employer fails to engage in an interactive process."); *Cannice*, 189 F.3d at 727.

The Eighth Circuit has recognized that although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith. *See Fjellestad*, 188 F.3d at 952; *Cravens*, 214 F.3d at 1021 (To establish that an employer failed to participate in an interactive process, a disabled employee must show the

employer knew about the disability; the employee requested accommodation or assistance; the employer did not make a good faith effort to assist the employee; and the employee could have been reasonably accommodated but for the employer's lack of good faith.). Accordingly, the Eigihth Circuit has held that summary judgment is typically precluded when there is a genuine dispute as to whether the employer acted in good faith and engaged in the interactive process of seeking reasonable accommodations. *See Cravens*, 214 F.3d at 1022; *Fjellestad*, 188 F.3d at 953; *accord Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (single telephone conversation between the plaintiff and employer "hardly satisfies our standard that the employer make reasonable efforts to assist the employee [and] to communicate with him in good faith").

On the other hand, summary judgment may be appropriate where the employee fails to engage in the interactive process. *See, e.g., Treanor*, 200 F.3d at 575 (the plaintiff failed to create a genuine question of fact in dispute on issue of interactive process where the plaintiff requested part-time work, the defendant indicated that no such position existed, the plaintiff failed to identify any particular "suitable" position and there was no evidence that the defendant acted in bad faith by failing to investigate further the existence of a reasonable accommodation); *Webster v. Methodist Occupational Health Centers, Inc.*, 141 F.3d 1236 (7th Cir. 1998) (no liability where employee failed to participate in the interactive process required under the ADA); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) (no liability where the plaintiff failed to engage in interactive process after employer offered accommodations in that she did not provide employer with any substantive reasons as to why all five of the proffered accommodations were unreasonable); *Gerdes v. Swift-Eckrich, Inc.*, 949 F. Supp. 1386 (N.D. Iowa 1996) (summary judgment for employer appropriate where responsibility for causing the breakdown of the interactive process rested plainly on the plaintiff), *aff'd*, 125 F.3d 634 (8th Cir. 1997).

Similarly, summary judgment may be appropriate in the absence of evidence that the employer failed to make a good faith effort to arrive at a reasonable accommodation for the plaintiff. *See, e.g., Mole*, 165 F.3d at 1218 (affirming grant of summary judgment for employer where "there is no evidence [the employer] failed to make a good faith reasonable effort to help [the plaintiff] determine if other accommodations might be needed."); *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996) ("[W]here, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodation based on the information it possessed, ADA liability simply does not follow.").

Statutory Defenses

The ADA specifically provides for the following defenses: (1) undue hardship (42 U.S.C. § 12112(b)(5)(A)); (2) direct threat to the health or safety of others in the workplace (42 U.S.C. § 12113(b)); (3) employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)); (4) religious entity (42 U.S.C. § 12113(d)(1)); (5) infectious or communicable disease (42 U.S.C. § 12113(e)(2)); and (6) illegal use of drugs (42 U.S.C. § 12114(a)). The statutory defenses most likely to lead to instruction issues are undue hardship and direct threat. *See infra* Model Instructions 5.53A and 5.53B. The Committee assumes that the burden of proving and pleading these defenses is on the defendant.

Undue Hardship

As set forth above, the ADA provides that an employer need not provide a reasonable accommodation if it can prove that the accommodation would impose an undue hardship on the operation of its business. The term "undue hardship" is defined as "an action requiring significant difficulty or expense," which is to be considered in light of the following factors: (i) the nature and cost of the accommodation; (ii) the employer's financial resources at the facility in question; (iii) the employer's overall financial resources; and (iv) the fiscal relationship of the facility in question with the employer's overall business. 42 U.S.C. § 12111(10).

Direct Threat

The ADA specifically permits employers to reject applicants and terminate employees who pose a "direct threat" to the health or safety of others in the workplace if such direct threat cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12113(b); *see Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) (insulin-dependent individuals with poorly controlled diabetes were not qualified to serve as school bus drivers).

The courts also have used the "direct threat" doctrine to support the terminations of individuals who assault or threaten coworkers. For example, in *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996), the court upheld the termination of an alcoholic employee who threatened his supervisor. *See also Crawford v. Runyon*, 79 F.3d 743 (8th Cir. 1996) (upholding district court's finding of no pretext in termination of postal worker who threatened to kill his supervisor); *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437 (D. Kan. 1996) (upholding termination of disgruntled employee who threatened to "go postal").

The Supreme Court, in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78 (2002), held that the statutory reference to threats to "other individuals in the workplace" did not preclude the EEOC from adopting a regulation that, in the Court's words, "carries the defense one step further," by allowing an employer to adopt a qualification standard requiring that an individual not pose a direct threat to the individual's own health or safety, as well as the health or safety of others. 29 C.F.R. § 1630.15(b)(2). *See also* 29 C.F.R. § 1630.2(r).

Procedures and Remedies

Pursuant to 42 U.S.C. § 12117, ADA cases generally adopt the procedures and remedy schemes from Title VII cases. *Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997). Accordingly, an EEOC charge and right-to-sue notice typically will be necessary preconditions to an ADA claim. *See* 42 U.S.C. § 2000e-5. By virtue of the Civil Rights Act of 1991, damages under the ADA generally are the same as those available under Title VII. Thus, potential remedies in ADA cases include backpay, compensatory damages, punitive damages, and attorneys' fees. *See* 42 U.S.C. § 1981a.

In ADA cases, a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor" in the adverse employment decision. *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995). *See also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97-102 (2003) (holding that "motivating factor" is the standard for liability in a Title VII discrimination case). The employer may nevertheless avoid an award of damages or reinstatement by showing that it would have taken the same action in the absence of the

impermissible motivating factor. *Pedigo*, 60 F.3d at 1301; *Doane*, 115 F.3d at 629. In such cases, "remedies available are limited to a declaratory judgment, an injunction that does not include an order for reinstatement or for back pay, and some attorney's fees and costs." *Doane*, 115 F.3d at 629 (quoting *Pedigo*, 60 F.3d at 1301) (citing 42 U.S.C. § 2000e-5(g)(2)(B)(i) & (ii)). *But see Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 397-98 (8th Cir. 1996) (discussing prevailing party for purposes of awarding attorneys' fees).

In addition, the ADA provides a "good faith" defense if an employer "demonstrates good faith efforts" to find a reasonable accommodation with the plaintiff. *See* 42 U.S.C § 1981a(a)(3) and Model Instruction 5.55, *infra*. If the jury finds that the employer has made such efforts, the plaintiff cannot recover compensatory or punitive damages. *See* 42 U.S.C. § 1981a(a)(3).

5.51A ADA - DISPARATE TREATMENT - ELEMENTS (Actual Disability)

Your verdict must be for the plaintiff and against the defendant if all of the following elements have been proved[1]:

First, the plaintiff had (specify alleged impairment(s));[2] and

Second, such (specify alleged impairment(s)) substantially limited the plaintiff's ability to (specify major life activity or activities affected); and[3]

Third, the defendant (specify action(s) taken with respect to the plaintiff)[4]; and

Fourth, the plaintiff could have performed the essential functions[5] of (specify job held or position sought)[6] at the time the defendant (specify action(s) taken with respect to the plaintiff) and

Fifth, the defendant knew[7] of the plaintiff's (specify alleged impairment(s)) and the plaintiff's (specify alleged impairment(s)) [was a motivating factor][8] [played a part][9] in the defendant's decision to (specify action(s) taken with respect to the plaintiff).

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),][10] then your verdict must be for the defendant. [You may find that the plaintiff's (specify alleged impairment(s)) [was a motivating factor] [played a part] in the defendant's (decision)[11] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [12]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. In a typical case, the plaintiff will allege discrimination on the basis of an actual disability. *See* 42 U.S.C. § 12102(1)(A). In such cases, the name of the condition is not essential as long as the specified condition fits the definition of an impairment, as that term is used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

As discussed in the Committee Comments, however, if the plaintiff contends that he or she had a record of a disability, the language of the instruction will have to be modified. *See* 42

U.S.C. § 12102(1)(B). For cases in which the plaintiff alleges that he or she was regarded by the defendant as having a disability, *see infra* Model Instruction 5.51B. *See id.* § 12102(1)(C).

3. This element is designed to submit the issue of whether the plaintiff's alleged impairment constitutes a "disability" under the ADA. If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52C.

4. Insert the appropriate language depending on the nature of the case (*e.g.*,"discharge," "failure to hire," "failure to promote," or "demotion" case). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52B.

6. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court's assessment that it could not evaluate whether the plaintiff was a qualified individual within the meaning of the ADA because the plaintiff failed to identify any particular job for which she was qualified).

7. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff's impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff's health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995))). For more discussion on this issue, *see supra* section 5.50.

8. "Motivating factor" is the proper phrase to use in the instruction, *see Pedigo v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), and the Committee recommends that the definition set forth in Model Instruction 5.96, *infra*, be given.

9. *See infra* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

10. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable

disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

11. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed to submit cases in which the primary issue is whether the plaintiff's disability was a motivating factor in the employment decision. The instruction may be modified if the plaintiff alleges that he or she has a record of a disability. *See* 42 U.S.C. § 12102(1)(B); 29 C.F.R. § 1630.2(g). If the plaintiff alleges that he or she did not have an actual disability, but that he or she was regarded by the defendant as having a disability, *see* 42 U.S.C. § 12102(1)(C), the appropriate instruction for use is Model Instruction 5.51B, *infra*.

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to this complex analysis is not necessary . . . or even recommended."); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992) ("[T]he *McDonnell Douglas* 'ritual is not well suited as a detailed instruction to the jury' and adds little understanding to deciding the ultimate question of discrimination.") (quoting *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985)). Instead, the submission to the jury should focus on the ultimate issues of whether intentional discrimination was a motivating factor in the defendant's employment decision. *See Lang*, 107 F.3d at 1312.

5.51B ADA - DISPARATE TREATMENT - ELEMENTS (Perceived Disability)

Your verdict must be for the plaintiff and against the defendant if all of the following elements have been proved[1]:

First, [the plaintiff had or] [the defendant knew or believed plaintiff had] (specify alleged impairment(s))[2] ; and

Second, the defendant (specify action(s) taken with respect to the plaintiff)[3]; and

Third, the plaintiff could have performed the essential functions[4] of (specify job held or position sought)[5] at the time the defendant (specify action(s) taken with respect to the plaintiff); and

Fourth, the defendant's belief regarding plaintiff's (specify alleged impairment(s)) [was a motivating factor][6] [played a part][7] in the defendant's decision to (specify action(s) taken with respect to the plaintiff).

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),][8] then your verdict must be for the defendant. [You may find that the plaintiff's (specify alleged impairment(s)) [was a motivating factor] [played a part] in the defendant's (decision)[9] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [10]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. It may be that in the majority of "perceived disability" cases, the plaintiff has an actual impairment, although the impairment does not substantially limit any of the plaintiff's major life activities. *See* 42 U.S.C. § 12102(3)(A) (explaining that an individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity). An impairment that is transitory (having an actual or expected duration of six months or less) and minor does not qualify as a perceived disability. 42 U.S.C. § 12102(3)(B).

The name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the

effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

3. Insert the appropriate language depending on the nature of the case (*e.g.*,"discharge," "failure to hire," "failure to promote," or "demotion" case). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.57.

4. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52B.

5. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court's assessment that it could not evaluate whether the plaintiff was a qualified individual within the meaning of the ADA because the plaintiff failed to identify any particular job for which she was qualified).

6. "Motivating factor" is the proper phrase to use in the instruction, *see Pedigo v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), and the Committee recommends that the definition set forth in Model Instruction 5.96, *infra*, be given.

7. *See infra* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

8. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

9. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

10. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed to submit cases in which the primary issue is whether the plaintiff's perceived disability was a motivating factor in the employment decision. *See* 42 U.S.C. § 12102(1)(C).

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to this complex analysis is not necessary . . . or even recommended.").

5.51A/B(1) ADA - DISPARATE TREATMENT "SAME DECISION"

If you find in favor of the plaintiff under Instruction ___,[1] then you must answer the following question in the verdict form[s]: Has it been proved[2] that the defendant would have (specify action taken with respect to the plaintiff) even if the defendant had not considered the plaintiff's (specify alleged impairment)?

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

Committee Comments

If a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor," the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action "in the absence of the impermissible motivating factor." *See* 42 U.S.C. § 2000e-5(g)(2)(B). This instruction is designed to submit this "same decision" issue to the jury. *See Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997) (discussing remedies available in "mixed motive" case under ADA); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) (same). *See also Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 396-97 (8th Cir. 1996) (discussing "prevailing party" for purposes of awarding attorneys' fees).

5.51C ADA - REASONABLE ACCOMMODATION CASES
(Specific Accommodation Identified)

Your verdict must be for the plaintiff and against the defendant if all of the following elements have been proved[1]:

First, the plaintiff had (specify alleged impairment(s));[2] and

Second, such (specify alleged impairment(s)) substantially limited the plaintiff's ability to (specify major life activity or activities affected); and[3]

Third, the defendant knew[4] of the plaintiff's (specify alleged impairment(s)); and

Fourth, the plaintiff could have performed the essential functions[5] of the (specify job held or position sought) at the time the defendant (specify action(s) taken with respect to the plaintiff) if the plaintiff had been provided with (specify accommodation(s) identified by the plaintiff)[6]; and

Fifth, providing (specify accommodation(s) identified by the plaintiff) would have been reasonable; and

Sixth, the defendant failed to provide (specify accommodation(s) identified by the plaintiff) and failed to provide any other reasonable accommodation.[7]

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),][8] then your verdict must be for the defendant.

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

3. This element is designed to submit the issue of whether the plaintiff's alleged impairment constitutes a "disability" under the ADA. If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52C.

4. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff's impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff's health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995))). For more discussion on this issue, *see supra* section 5.50.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52B.

6. It may be that in the majority of cases, the plaintiff requests the provision of a specific accommodation (*e.g.*, a modified work schedule). In some cases, however, the plaintiff may simply notify the employer of his or her need for an accommodation in general. In such cases, the language of the instruction should be modified.

7. An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

8. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

Committee Comments

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). Although many individuals with disabilities are qualified to perform the essential functions of jobs without need of any accommodation, this instruction is designed for use in cases in which the nature or extent of accommodations provided to an otherwise qualified individual is in dispute. For a discussion of the "interactive process" in

which employers and employees may be required to engage to determine the nature and extent of accommodations needed, *see supra* section 5.50.

The term "accommodation" means making modifications to the work place which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability. *See Kiel*, 169 F.3d at 1136 ("A reasonable accommodation should provide the disabled individual an equal employment opportunity, including an opportunity to attain the same level of performance, benefits, and privileges that is available to similarly situated employees who are not disabled.").

A "reasonable" accommodation is one that could reasonably be made under the circumstances and may include but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. § 1630.2(o); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995).

Although part-time work and job restructuring may be considered reasonable accommodations, "[t]his does not mean an employer is required to offer those accommodations in every case." *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000). Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788). The ADA does not require an accommodation "that would cause other employees to work harder, longer, or be deprived of opportunities." *Rehrs v. The Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (the plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be "necessary" as a reasonable accommodation. *See Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1018 (8th Cir. 2000). The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of "last resort"; that is, the "very prospect of reassignment does not even arise unless accommodation within the individual's current position would pose an undue hardship." *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). An employer who has an

established policy of filling vacant positions with the most qualified applicant is not required to assign the vacant position to a disabled employee who, although qualified, is not the most qualified applicant. *Huber v. Wal-Mart Stores*, 486 F.3d 480, 483-84 (8th Cir. 2007). In addition, an employer is not required to "bump" another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be "otherwise qualified" for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

An employer's showing that the requested accommodation would violate the rules of an existing seniority system (*e.g.*, an employee's request to remain at a lighter duty position in the mailroom, in disregard of more senior employees' rights to "bid in" to that position) is ordinarily enough to show that the accommodation is not "reasonable" and to entitle the employer to summary judgment. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394, 403-04, 122 S. Ct. 1516, 1519, 1524 (2002). The employee may defeat summary judgment and create a jury question by presenting evidence of special circumstances that make an exception to a seniority rule "reasonable" in the particular case. *Id.* at 1519, 1525. Examples of special circumstances are the employer's fairly frequent exercise of a right to change the seniority system unilaterally and a seniority system containing exceptions such that one further exception is unlikely to matter. *Id*. at 1525.

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.3d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record which allegedly had resulted from prior psychological problems because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees").

In some cases, the timing of the plaintiff's alleged disability is critical. If necessary, the language may be modified to incorporate the relevant time frame of the plaintiff's alleged disability.

5.52A ADA - DEFINITION: DISABILITY

[No definition recommended.]

Committee Comments

As drafted, the Model Instructions do not use the term "disability" and, thus, do not require the jury to determine whether a plaintiff has a "disability." Rather, the instructions require the jury to find the facts which support the underlying elements of a disability under the Act.

5.52B ADA - DEFINITION: ESSENTIAL FUNCTIONS

In determining whether a job function is essential, you should consider the following factors: [(1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of persons who have held the job; (7) the current work experience of persons in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; (10) whether the function is highly specialized and the individual in the position was hired for [(his) (her)] expertise or ability to perform the function; and (11) (list any other relevant factors supported by the evidence)].[1]

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

The term "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. The term "essential functions" does not include the marginal functions of the position.

Notes on Use

1. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

Committee Comments

The ADA protects only those individuals who, with or without reasonable accommodation, can perform the essential functions of the employment position that the plaintiff holds or desires. *See* 42 U.S.C. § 12111(8); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 786-87 (8th Cir. 1998); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995). Thus, this instruction is designed for use in connection with the essential elements instruction in cases where the issue of whether a particular job requirement or task is an "essential function" of the job is in dispute. The instruction, although not technically a definition, should be used to instruct the jury in determining whether a given job duty is essential.

The instruction is based on 29 C.F.R. § 1630.2(n) and the Eighth Circuit's opinions in *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) ("An employer's identification of a position's 'essential functions' is given some deference under the ADA."); *Moritz*, 147 F.3d at 787; and *Benson*, 62 F.3d at 1113.

5.52C ADA - DEFINITION: SUBSTANTIALLY LIMITS

In determining whether the plaintiff's impairment substantially limits the plaintiff's ability to (specify major life activity affected), you should compare the plaintiff's ability to (specify major life activity affected) with that of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment. [Temporary impairments with little or no long-term impact are not sufficient.][1]

It is not the name of an impairment or a condition that matters, but rather the effect of an impairment or condition on the life of a particular person.

Notes on Use

1. Use the bracketed language only if it is supported by the evidence.

Committee Comments

This instruction is designed for use in connection with the essential elements instruction in cases in which the issue of whether the plaintiff has a disability under the ADA is in dispute. The language of the instruction is based on 29 C.F.R. § 1630.2(j). The term "substantially limits" may be of such common usage that a definition is not required. If the Court desires to define the term, however, the Committee recommends this definition. This instruction should not be given in cases where the plaintiff claims that the defendant "regarded" the plaintiff as having an impairment.

An impairment is only a disability under the ADA if it substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(1).

5.53A "UNDUE HARDSHIP" - STATUTORY DEFENSE

Your verdict must be in favor of the defendant if it has been proved[1] that providing (specify accommodation) would cause an undue hardship on the operation of the defendant's business.

The term "undue hardship," as used in these instructions, means an action requiring the defendant to incur significant difficulty or expense when considered in light of the following:

[(1) the nature and cost of (specify accommodation);

(2) the overall financial resources of the facility involved in the provision of (specify accommodation), the number of persons employed at such facility and the effect on expenses and resources;

(3) the overall financial resources of the defendant;

(4) the overall size of the business of the defendant with respect to the number of its employees and the number, type and location of its facilities;

(5) the type of operation of the defendant, including the composition, structure, and functions of the workforce;

(6) the impact of (specify accommodation) on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

and (list any other relevant factors supported by the evidence)].[2]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

Committee Comments

Under the ADA, an employer must provide a reasonable accommodation to the known physical limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business. *See* 42 U.S.C. § 12111(9), 42 U.S.C. § 12112(b)(5) and Model Instruction 5.51B, *supra*, Committee Comments. Thus, this instruction should be used to submit the defense of undue hardship. *See* 42 U.S.C. § 12111(10).

Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Des Moines Bd. of Water Works v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

5.53B "DIRECT THREAT" - STATUTORY DEFENSE

Your verdict must be in favor of the defendant if it has been proved[1] that:

First, the defendant (specify action(s) taken with respect to the plaintiff) because the plaintiff posed a direct threat to the health or safety of [(the plaintiff) (others) (the plaintiff or others)[2]] in the workplace; and

Second, such direct threat could not be eliminated [3] by reasonable accommodation.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must be based on an individualized assessment of the plaintiff's present ability to safely perform the essential functions of the job.

In determining whether a person poses a direct threat, you must consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the likely time before the potential harm occurs.

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Select the word or phrase that best describes the defendant's theory.

3. The term "direct threat" is defined by the ADA as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *See* 42 U.S.C. § 12111 (3). The applicable regulations define "direct threat" as a "significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated *or reduced* by reasonable accommodation." *See* 29 C.F.R. § 1630.2(r) (emphasis added).

Committee Comments

This instruction should be used in submitting the defense of direct threat. *See* 42 U.S.C. § 12111(3); 29 C.F.R. 1630.2(r). Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Des Moines Bd. of Water Works v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

Under the ADA, an employer may apply its qualification standards, tests, or selection criteria to screen out, deny a job to, or deny a benefit of employment to a disabled person, if such criteria are job-related and consistent with business necessity and if the person cannot perform the essential function of the position with reasonable accommodation. 42 U.S.C. § 12113(a); *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1283-84 (7th Cir. 1995).

The ADA includes within the term "qualification standards" the requirement that the employee not pose a direct threat to the health or safety of other individuals in the workplace. *See* 42 U.S.C. § 12133(b). The Supreme Court has upheld 29 C.F.R. §§ 1630.2(r) and 1630.15(b)(2), which also allow an employer to adopt a qualification standard requiring that the individual not pose a direct threat to his or her own safety. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78 (2002).

For a discussion of the "direct threat" defense in the health care context, *see Bragdon v. Abbott*, 524 U.S. 624, 649-50 (1998) (health care professional has duty to assess risk based on objective, scientific information available to him or her and others in profession).

5.54A ACTUAL DAMAGES

If you find in favor of the plaintiff under Instruction ___[1] [and if you answer "no" in response to Instruction ___,][2] then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained as a direct result of [describe the defendant's decision--e.g., "the defendant's failure to hire the plaintiff"]. The plaintiff's claim for damages includes three distinct types of damages and you must consider them separately.

First, you must determine the amount of any wages and fringe benefits[3] the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge] through the date of your verdict,[4] *minus* the amount of earnings and benefits that the plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by the plaintiff, such as [list damages supported by the evidence].[5] You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.[6]

[You are also instructed that the plaintiff has a duty under the law to "mitigate" [(his) (her)] damages--that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if it has been proved[7] that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.][8]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][9]

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here. Even if the jury finds that the defendant would have made the same decision regardless of the plaintiff's disability, the Court may direct the jury to determine the amount of damages, if any, sustained by the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.

3. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002) (discussing lost benefits in ADEA case); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1111 (8th Cir. 1994) (allowing insurance replacement costs, lost 401(k) contributions in ADEA case).

4. Front pay is an equitable issue for the judge to decide. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002). In some cases, the defendant will assert some independent post-discharge reason--such as a plant closing or sweeping reduction in force--as to why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). In those cases, this instruction must be modified to submit this issue for the jury's determination.

5. Under the Civil Rights Act of 1991, a prevailing ADA plaintiff may recover damages for mental anguish and other personal injuries. The types of damages mentioned in § 1981a(b)(3) include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." For cases involving the provision of a reasonable accommodation (Model Instruction 5.51C, *supra*), the plaintiff may not recover such damages if the defendant demonstrated "good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 5.55.

6. If the issue of "front pay" is submitted to the jury, it should be distinguished from an award of compensatory damages, which is subject to the statutory cap. *See infra* Committee Comments. Accordingly, separate categories of damages must be identified.

7. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

8. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

9. This paragraph may be given at the trial court's discretion.

Committee Comments

The Civil Rights Act of 1991 makes three significant changes in the law regarding the recovery of damages in Title VII cases. First, the plaintiff prevails on the issue of liability by showing that unlawful discrimination was a "motivating factor" in the relevant employment decision; however, the plaintiff cannot recover any actual damages if the employer shows that it would have made the same employment decision even in the absence of any discriminatory intent. 42 U.S.C. § 2000e-2(g)(2)(B). Second, the Civil Rights Act permits the plaintiff to recover general compensatory damages in addition to the traditional employment discrimination remedy of back pay and lost benefits. *Id.* § 1981a(a). Third, the Act expressly limits the recovery of general compensatory damages to certain dollar amounts, ranging from $50,000 to $300,000 depending upon the size of the employer. *Id.* § 1981a(b).

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982). This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Industries*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same). *But see Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same). However, because Title VII, as amended by the Civil Rights Act of 1991, no longer limits recovery of damages, the instruction permits the recovery of general damages for pain, suffering, humiliation, and the like.

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to "general damages." As a result, the trial court would not be able to determine whether the jury's award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

In *Kramer v. Logan County School Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998), the court ruled that "front pay is an equitable remedy excluded from the statutory limit on compensatory damages provided for in [42 U.S.C.] § 1981a(b)(3)."

Although the Civil Rights Act of 1991 expressly limits the amount of compensatory and punitive damages depending upon the size of the employer, the jury shall not be advised on any such limitation. 42 U.S.C. § 1981a(c)(2). Instead, the trial court will simply reduce the verdict by the amount of any excess.

5.54B NOMINAL DAMAGES

If you find in favor of the plaintiff under Instruction ___[1] [and if you answer "no" in response to Instruction ___,][2] but you do not find that the plaintiff's damages have monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar ($1.00).[3]

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here. Even if the jury finds that the defendant would have made the same decision regardless of the plaintiff's disability, the Court may direct the jury to determine the amount of damages, if any, awarded to the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.

3. One dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value of the harm that the plaintiff suffered from the violation of his rights. *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) (Title VII); *cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value of the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some case, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

5.54C PUNITIVE DAMAGES - ADA

In addition to the damages mentioned in the other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) _____,[1] and if you answer "no" in response to Instruction _____,[2] then you must decide whether the defendant acted with malice or reckless indifference to the plaintiff's right not to be discriminated against[3] on the basis of a disability. The defendant acted with malice or reckless indifference if:

it has been proved[4] that [insert the name(s) of the defendant or manager[5] who terminated[5] the plaintiff's employment] knew that the (termination)[6] was in violation of the law prohibiting disability discrimination, or acted with reckless disregard of that law.[7]

[However, you may not award punitive damages if it has been proved [that the defendant made a good-faith effort to comply with the law prohibiting disability discrimination][8].

If it has been proved that the defendant acted with malice or reckless indifference to the plaintiff's rights [and did not make a good faith effort to comply with the law,] then, in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future.

In determining whether to award punitive damages, you should consider whether the defendant's conduct was reprehensible.[9] In this regard, you may consider whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also caused harm or posed a risk of harm to others; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff.[10]

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. how much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].[11] [You may not consider harm to others in deciding the amount of punitive damages to award.][12]

2. what amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [(his) (her) (its)] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future;

3. [the amount of fines and civil penalties applicable to similar conduct].[13]

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.[14]

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][15]

[You may not award punitive damages against the defendant[s] for conduct in other states.][16]

Notes on Use

1. Fill in the number or title of the essential elements instruction here. *See supra* Model Instructions 5.51A, 5.51B and 5.51C.

2. Fill in the number or title of the "same decision" instruction if applicable. *See supra* Model Instruction 5.51A/B(1).

3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive damages. Under the Civil Rights Act of 1991, the standard for punitive damages is whether the defendant acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. § 1981a(b)(1)).

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired the plaintiff."

6. This language is designed for use in a discharge case. In a "failure to hire," "failure to promote," "demotion," or "constructive discharge" case, the language must be modified.

7. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 536 (1999) (holding that "'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination" and that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages"); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006) (citing *Kolstad* and observing that an award of punitive

damages may be inappropriate when the underlying theory of discrimination is novel or poorly recognized or "when the employer (1) is unaware federal law prohibits the relevant conduct, (2) believes the discriminatory conduct is lawful, or (3) reasonably believes there is a bona fide occupational qualification defense for the discriminatory conduct").

8. Use this phrase only if the good faith of the defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), a Title VII case. For a discussion of *Kolstad*, see the Committee Comments. It is not clear from the case who bears the risk of nonpersuasion on the good faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

9. The word "reprehensible" is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." In *Philip Morris USA v. Williams*, ___ U.S. ___, ___, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 1064.

10. The court may, of course, exclude any item not relevant to the outcome.

11. This sentence may be used if there is evidence of future harm to the plaintiff.

12. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, ___ U.S. at ___, 127 S. Ct. at 1064-65; *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

13. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting "civil penalties authorized in comparable cases" as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

14. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and observing that: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.").

15. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

16. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

Committee Comments

Under the Civil Rights Act of 1991, a Title VII or ADA plaintiff may recover damages by showing that the defendant engaged in discrimination "with malice or with reckless indifference to [his or her] federally protected rights." *See* 42 U.S.C. § 1981a(b)(1). *See also* Model Instruction 4.53, *supra*, on punitive damages and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In 1999, the United States Supreme Court explained that the terms "malice" and "reckless" ultimately focus on the actor's state of mind. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Id.* To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. *Id.* at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an "egregious" nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer's state of mind. *Id.* at 546.

The *Kolstad* case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII and the ADA are both efforts to promote prevention of discrimination as well as remediation, the Court held that an employer may not be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good faith efforts to comply with Title VII or the ADA. *Id.* at 545. The Court does not clarify which party has the burden of proof on the issue of good faith.

For cases involving the provision of a reasonable accommodation (*see supra* Model Instruction 5.51C), the plaintiff may not recover punitive damages if the defendant demonstrated "good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 5.55.

Under the ADA, as amended by the Civil Rights Act of 1991, the upper limit on an award including punitive and compensatory damages is $300,000. *See* 42 U.S.C. § 1981a(b)(3) (limiting the sum of compensatory and punitive damages awards depending on the size of the employer). For a discussion of submitting punitive damages to the jury under both state and federal law, *see Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575-78 (8th Cir. 1997).

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, ___ U.S. ___, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO*

Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the court observed: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" (quoting *Honda Motor*, 512 U.S. at 432). *See Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the court held that: "A state cannot punish a defendant for conduct that may have been lawful where it occurred…Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The court specifically mandated that: "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

5.55 "GOOD FAITH" DEFENSE TO COMPENSATORY AND PUNITIVE DAMAGES

If you find in favor of the plaintiff under Instruction ___,[1] then you must answer the following question in the verdict form(s): Has it been proved[2] that the defendant made a good aith effort and consulted with the plaintiff, to identify and make a reasonable accommodation?

Notes on Use

1. Fill in the number or title of the "reasonable accommodation" essential elements instruction here (Model Instruction 5.51C, *supra*).

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

Committee Comments

This instruction is designed for use in cases where a discriminatory practice involves the provision of a reasonable accommodation. The language is derived from 42 U.S.C. § 1981a(a)(3), which provides that the plaintiff may not recover damages if the defendant "demonstrates good faith efforts" to arrive at a reasonable accommodation with the plaintiff.

If the jury answers the above interrogatory in the affirmative, the plaintiff may still be entitled to attorneys' fees and nominal damages.

5.56 BUSINESS JUDGMENT

Committee Comments

See infra Model Instruction 5.94.

5.57 CONSTRUCTIVE DISCHARGE

Committee Comments

See infra Model Instruction No. 5.93.

8.81B PUNITIVE DAMAGES

If you find in favor of the plaintiff and against defendant [name of defendant] under Instruction(s) _____, and if you further find that defendant [name of defendant] acted willfully and wantonly with reckless or callous disregard for the rights of others, or acted with gross negligence or actual malice or criminal indifference, then you may, but are not required to, award punitive damages against that defendant. The purpose of an award of punitive damages is to punish the subject defendant and to deter [(it) (him) (her)] and others from acting as [(it) (he) (she)] did.

Committee Comments

See Fifth Circuit Pattern Jury Instructions (Civil), § 4.10 (2009 Revision) and *Gamma Plastics, Inc. v. American Plastics Lines, Ltd*, 32 F.3d 1244, 1254 (8th Cir. 1994). This instruction may be used in any case of property damage that would otherwise qualify under 28 U.S.C. § 1333, but is before the court on diversity jurisdiction, either as an original action or as a result of being removed, and a jury demand has been made. This instruction is included because of the Supreme Court opinion in a massive pollution case approving punitive damages under the general maritime law, but only in an amount not to exceed compensatory damages. *Exxon Shipping Co. v. Baker*, ___ U.S. ___, 128 S. Ct. 2605 (2008). The *Exxon* case does not, however, necessarily resolve the issue of whether general maritime law permits recovery of punitive damages by nonseamen who suffer personal injury or death. There is presently a split of authority on the issue. *See infra* Instruction 8.00 (punitive damages). The *Gamma Plastics* case involved damage to cargo only and its discussion of punitive damages is dicta. Nevertheless, the discussion of the issue in *Gamma* is an indication that the Eighth Circuit would permit recovery of punitive damages in nonseaman wrongful death cases because the opinion it cites, *Churchill v. F/U FJORD*, 892 F.2d 763 (9th Cir. 1988), is such a case.

Punitive damages are available under general maritime law for a willful failure to pay an injured seaman maintenance and cure. *See Atlantic Sounding Co., Inc. v. Townsend*, ___ U.S. ___, 2009 WL 17894669 (June 25, 2009).

This instruction is not to be used in seaman's cases under the Jones Act or in unseaworthiness suits under general maritime law. *Cf. Miles v. Apex Marine Corp.,* 498 U.S. 19, 28, 32 (1990); *Atlantic Sounding Co., Inc. v. Townsend,* ___ U.S. ___, 2009 WL 17894669, at *9 (June 25, 2009).